SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-397

Supreme Court, U. S.
FILED
JUN 18 1973
MICHAEL RODAK, JR., CLERK

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

vs.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Arizona

---

BRIEF OF RESPONDENTS

GARY K. NELSON
THE ATTORNEY GENERAL OF ARIZONA

By: Dale R. Shumway
Special Assistant
64 East Broadway
Tempe, Arizona 85282
Attorney for Respondemts

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-397

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

vs.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Arizona

---

BRIEF OF RESPONDENTS

GARY K. NELSON
THE ATTORNEY GENERAL OF ARIZONA

By: Dale R. Shumway
Special Assistant
64 East Broadway
Tempe, Arizona 85282
Attorney for Respondents

INDEX

SUBJECT INDEX

BRIEF OF RESPONDENT

	Page
Preliminary Statement	1
Statement of Facts	2
Statutes Involved	14
Questions Presented	16
Summary of Argument	16
Argument	
I. At Statehood, Arizona Received Title to the Lands Within the Bed of the Navigable Colorado River Lying East of the Thread or Center Line of the Stream and Below the Ordinary High Water Mark	18
II. The Bed of the Colorado River in its Natural State Included all of the Area Below the Ordinary High Water Mark Which is the Line Created by the Water During the Natural Annual High Flow Stage of the River	23
III. The State of Arizona Continues to Own the New Bed of the Colorado River Where it is Altered by Natural Accretive Movements of the River	31.

A. Where Movements of a Navigable Stream are Found to be Accretive, or Relictive as Differentiated from Avulsive, the State Continues to Own the Bed ofthe River Established by Accretion or Reliction. 31

B. Where Facts are Insufficient to Establish the Manner of Movement of a Navigable Stream There is a Presumption that Movements Were Accretive and Not Avulsive 34

C. Where the Bed of a Navigable River is Altered by Artificial Changes, the State Continues to Own that Portion of the Bed Which it Owned Prior to the Alteration 35

IV. Petitioner's Other Contentions Are Without Merit 39

A. Whether a Decision of the Arizona Supreme Court Affects Title to Federal Land and Indian Land as Well as Private Land Bordering the Colorado River 39

B. The Effect of the Submerged Lands Act 40

C. The Decisions of the Arizona Supreme Court do not Constitute a Taking of Property Without Compensation 40

Conclusion 44

TABLE OF CASES

Page

Alabama v. Georgia, 64 U.S. (23 How) 505..... 24,27,28

Arizona v. California, 283 U.S. 423, 75L.ed 1154, 51 S.Ct. 522.....18

Arkansas v. Tennessee, 246 U.S. 158, 173..... 34,37

City of Cedar Rapids v. Marshall, 199 Iowa 1262, Loc. cit. 1264, 203 N.W. 932-933..... 29

County of St. Clair v. Lovingston, 90 U.S. 46..... 33,35

Elliot v. Atlantic City, (CC. D.N.J., 1907) 149 F 849, 853 38

Hardin v. Jordan, 140 U.S. 371..... 20

Herron v. Choctaw and Chickasaw Nations (10th Cir. 1956) 228 F2d 830..... 38

Howard v. Ingersol, 54 U.S. (13 How) 380..... 24,26,27,29

Kansas v. Colorado, 206 U.S. 46, 49..... 20

Martin, et al v. Waddell, 16 Pet. 410..... 20

Nebraska v. Iowa, 143 U.S. 359, 369-370 (1892)..... 35

Oklahoma v. Texas, 260 U.S. 606..... 24

TABLE OF CASES

Page

CASES (Continued)

Padgett v. Central and Southern
Florida Flood Control Dist.
(Fla), 178 So2d 900 37

People v.Hecker, Cal. App. 1960,
4 Cal. R. 334 22,40

People v. Shasta Pipe and Supply Co.
70 Cal. R. 618..... 37

Pollard's Lessee v. Hagan (3 How)
44 U.S. 212, 11 L.ed 565..... 20,28

Ray v. State (Tex) 153 S.W.2d 660..... 37

Shiveley v. Bowlby, 152 U.S. 1, 43
14 S. Ct. 548..... 20

State v. Aucoin, 206 La. 786,
20 So. 2d 136 37

State v. Bonelli Cattle Company,
489 P2d 699, 495 P2d 1312 ...17,23,28,30,35

State v. Gunther & Shirley Co.,
5 Ariz. App. 77, 423 P2d 352.....34

State v. Jacobs, 93 Ariz. 336,
380 P2d 98..... 34

State v. Sorenson, 222 Iowa 1248,
271 N.W. 234 29

Stockley v. Cissna (6th Cir. 1902)
119 F. 812, 831..... 38

Towl, et al, v. Kelly and Blakenship,
54 I.D. 455 (1934).....38

Tyson v. State of Iowa (8th Cir. 1960)
283 F2d 802..... 20

CASES (Continued)

Padgett v. Central and Southern
Florida Flood Control Dist.
(Fla., 178 So2d 909 37

People v. Becker, Cal. App. 1960,
4 Cal. R. 334 22,40

People v. Ohaus Pipe and Supply Co.
70 Cal. R. 818..... 37

Pollard's Lessee v. Hagan (3 How)
44 U.S. 212, 11 L.ed 565..... 20,28

Ray v. State (Tex) 133 S.W.2d 666..... 37

Shiveley v. Bowlby, 152 U.S. 1, 41
14 S. Ct. 548..... 20

State v. Angelo, 206 La. 796,
19 So. 2d 136 37

State v. Bonwit Cattle Company,
189 P2d 699, 185 P2d 1312 ..17,23,28,30,35

State v. Gumbee & Shirley Co.,
5 Ariz. App. 71, 423 P2d 152..... 34

State v. Jacobs, 93 Ariz. 136,
380 P2d 98..... 34

State v. Sorenson, 227 Iowa 1248,
271 N.W. 274 29

Stockley v. State (6th Cir. 1902)
119 F. 812, 821..... 38

Towl, et al. v. Kelly and Blakemanip;
54 I.D. 455 (1934)..... 38

Tyson v. State of Iowa (8th Cir. 1960)
283 F2d 402..... 20

CASES (Continued)

United States v. Appalachian Electric Power Co. 311 U.S. 377, 408, 61 S. Ct. 291, reh. den., 312 U.S. 712, 61 S. Ct. 548.....19

United States v. Claridge, 416 F2d 933 (Cert. Den. 3/2/70), 397U.S. 961, 25 L.ed 2d 253, 90 Sup. Ct. 994.....24,30

Widdecombe v. Rosemiller, 118 F. 295 299-300..... 38

Wilemon v. City and County of Dallas Levee Imp. Dist., (Tex), 264 S.W.2d 543 (Cert. Den. 348 U.S. 829) 37

STATUTES

Boulder Canyon Project Act., Sec. 617 43 Stat..... 15,19

Submerged Lands Act, Sec. 1057 45 Stat., Sec. 1301 st seq. 43 Stat.....14,21,22,40

37 U.S. Stat. 39..... 21
37 U.S. Stat. 1738 21
67 U.S. Stat. 29 21,40

OTHER MATERIAL

Blackstone, 2 Commentaries 262.....33
56 Am. Jur. Waters
Sec. 241 21
Sec. 453 20
Sec. 476 33
65 C.J.S. Navigable Waters, Sec. 92..... 20
3 Pomeroy's Equity Jurisprudence, Sec. 805, p. 91..... 41

CASES (Continued)

United States v. Appalachian Electric
Power Co., 311 U.S. 377, 408,
61 S. Ct. 291, rehg. den.,
312 U.S. 713, 61 S. Ct. 548.....19

United States v. Chatlos, 418 F2d
933 (Cert. Den. 1/23/70),
397U.S. 961, 25 L.ed 2d 293,
90 Sup. Ct. 396.....24,30

Waldecombe v. Rosenfiler, 118 S. 295
249-300.....39

Wilson v. City and County of Dallas
Joyce Imp. Dist., (Tex), 254 S.W.2d
543 (Cert. Den. 348 U.S. 829).....37

STATUTES

Boulder Canyon Project Act,
Sec. 617 43 stat.....15,19

Submerged Lands Act, Sec. 1057 43 Stat.,
Sec. 1301 et seq. 43 Stat.....14,21,22,40

37 U.S. Stat. 39.....22
37 U.S. Stat. 1316.....21
67 U.S. Stat. 29.....21,40

OTHER MATERIAL

Blackstone, 2 Commentaries 263.....37
56 Am. Jur. Waters
Sec. 261 24
Sec. 153 20
Sec. 476 17
65 C.J.S. Navigable Waters, Sec. 97.....20
3 Pomeroy's Equity Jurisprudence,
Sec. 805, p. 91.....41

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-397

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

vs.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents.

On Writ of Certiorari to the Supreme Court OF THE STATE OF ARIZONA

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

The decision under review arose on a quiet title complaint filed in the Superior Court of the State of Arizona in and for the county of Mohave. (App. 3) Pursuant to stipulation, the

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-397

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

vs.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents.

On Writ of Certiorari to the Supreme Court OF THE STATE OF ARIZONA

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

The decision under review arose on a quiet title complaint filed in the Superior Court of the State of Arizona in and for the County of Mohave. (App. 1) Pursuant to stipulation, the

matter was transferred to the Pinal County Superior Court and thereafter an Agreed Statement of Facts and Issues (App. 6) was entered into between the parties and the matter was submitted to the Court for its decision. Judgment was entered quieting title to the petitioner and thereafter an appeal was taken to the Court of Appeals of the State of Arizona. The Court affirmed the judgment of the trial Court and a Petition for Review was filed with the Supreme Court of Arizona. The Supreme Court reversed and directed the trial Court to enter judgment quieting title in the State of Arizona.

STATEMENT OF FACTS

The petitioner BONELLI CATTLE COMPANY claims to be the record owner of real property situate in Mohave County, State of Arizona, described as:

matter was transferred to the Final County Superior Court and thereafter an Agreed Statement of Facts and Issues (App. 5) was entered into between the parties and the matter was submitted to the Court for its decision. Judgment was entered quieting title to the petitioner and thereafter an appeal was taken to the Court of Appeals of the State of Arizona. The Court affirmed the judgment of the trial Court and a Petition for Review was filed with the Supreme Court of Arizona. The Supreme Court reversed and directed the trial Court to enter judgment quieting title in the State of Arizona.

STATEMENT OF FACTS

The petitioner BONELLI CATTLE COMPANY claims to be the record owner of real property situate in Mohave County, State of Arizona, described as:

> Lot One (1); the South Half of the Northeast Quarter (S1/2NE1/4) and the Southeast Quarter (SE1/4) of Section Three (3), Township Nineteen (19) North, Range Twenty-two (22) West of the Gila and Salt River Base and Meridian.

Its source of title is a warranty deed from Harry E. Miller and Orpha S. Miller, his wife, dated the 12th day of August, 1955. (App. 14) The chain of title prior to this deed extends to a patent issued by the United States, dated November 5, 1910, to the Santa Fe Pacific Railway Company. (App. 16)

In an effort to establish the location of the subject property in relation to the Colorado River and in relation to movements of that river, several maps and photographs were attached to the Agreed Statement of Facts and Issues presented to the trial Court. (App. 6) These maps and photographs were not included in the appendix but are a

Lot One (1), the South Half of the Northeast Quarter (S1/2NE1/4) and the Southeast Quarter (SE1/4) of Section Three (3), Township Nineteen (19) North, Range Twenty-two (22) West of the Gila and Salt River Base and Meridian.

Its source of title is a warranty deed from Harry E. Miller and Orpha S. Miller, his wife, dated the 12th day of August, 1953. (App. 14) The chain of title prior to this deed extends to a patent issued by the United States, dated November 5, 1910, to the Santa Fe Pacific Railway Company. (App. 15)

In an effort to establish the location of the subject property in relation to the Colorado River and in relation to movements of that river, several maps and photographs were attached to the Agreed Statement of Facts and Issues presented to the trial Court. (App. 6) These maps and photographs were not included in the appendix but are a

part of the record before this Court.

The earliest plat showing the location of the river in relation to the subject property is a plat dated 1902 and designated as "Plan Profile of Colorado River from Black Canyon, Ariz. - Nev. to Arizona - Sonora Boundary, Sheet C". This map is attached to the Agreed Statement of Facts and Issues (App. 6) as Exhibit "K". As a convenience to this Court, we have reproduced a portion of this exhibit and have inserted it herein as Figure 1 found on page 5.

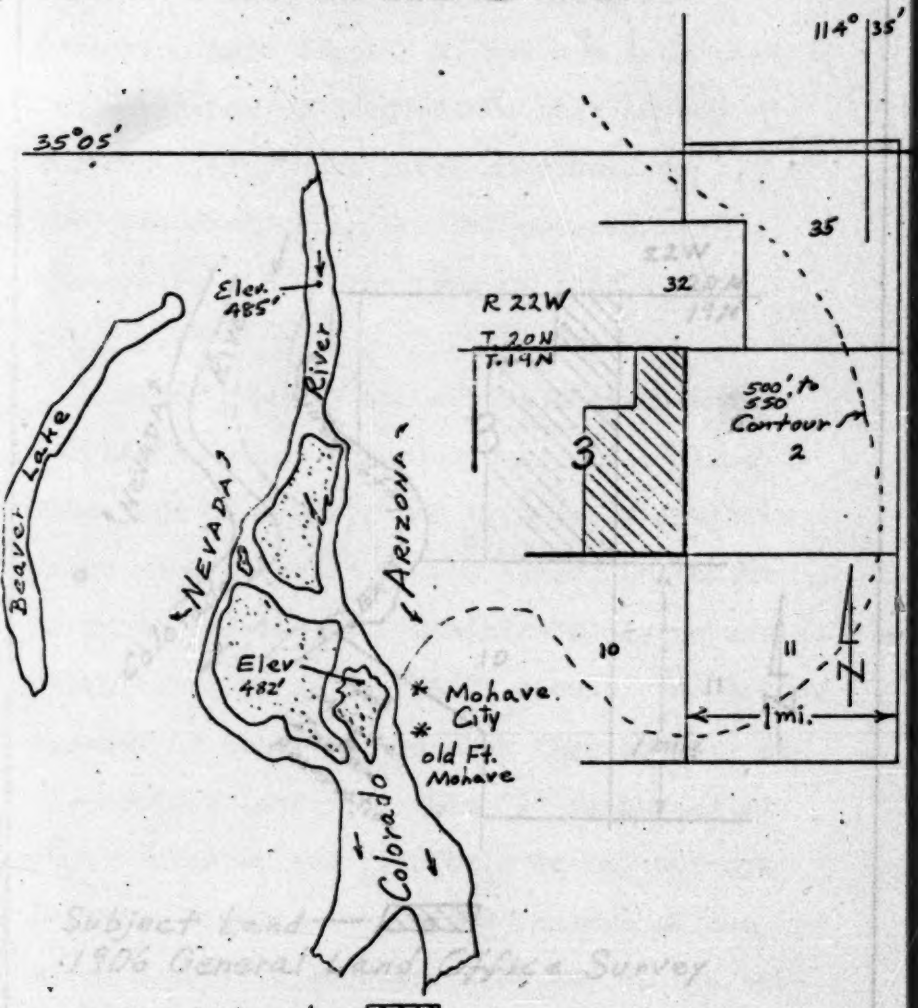
The original survey of the subject land by the Surveyor General's Office of the United States Department of the Interior was made December 24, 1905 to January 24, 1906. A copy of this survey is attached to the Agreed Statement of Facts and Issues as Exhibit "B".(App. 15) Inserted herein as Figure 2 found on page 6 is a reproduction of a portion of that

part of the record before this Court.

The earliest plat showing the loca-
tion of the river in relation to the subject
property is a plat dated 1902 and designated
as "Plan Profile of Colorado River from
Black Canyon, Ariz. & Nev. to Arizona -
Sonora Boundary, Sheet C". This map is
attached to the Agreed Statement of Facts and
Issues (App. 5) as Exhibit "K". As a con-
venience to this Court, we have reproduced a
portion of this exhibit and have inserted it
herein as Figure 1 found on page 5.

The original survey of the subject land
by the Surveyor General's Office of the United
States Department of the Interior was made
December 24, 1908 to January 24, 1906. A copy
of this survey is attached to the Agreed State-
ment of Facts and Issues as Exhibit "B". (App.
15) Inserted herein as Figure 2 found on page
6 is a reproduction of a portion of that

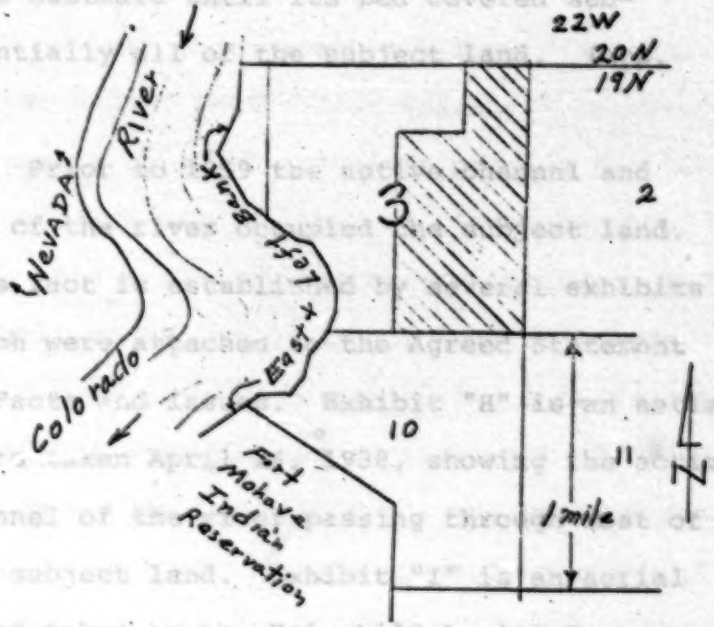
Sec. 3 - 19N, 22W
Subject Land in Relation to
1902 River Channel.



Subject Land — ▨
1902 Geological Survey

Fig. 1. Exhibit K

Sec. 3 - 19N, 22W
Subject Land in Relation to
1906 River Channel



Subject Land —
1906 General Land Office Survey

Fig. 2. Exhibit B

3
10
11
1 mile

exhibit showing the Colorado River encroaching into Section 3, but not into the subject land. Subsequent to that survey and conveyance, the river continued to move eastward until its bed covered substantially all of the subject land. (App. 10)

Prior to 1959 the active channel and bed of the river occupied the subject land. This fact is established by several exhibits which were attached to the Agreed Statement of Facts and Issues. Exhibit "H" is an aerial photo taken April 24, 1938, showing the active channel of the river passing through most of the subject land. Exhibit "I" is an aerial photo taken by the Fairchild Aerial Surveys in 1942, showing the active channel of the river occupying substantially all of the subject land. Exhibit "J" is the Davis Dam, Quadrangle-Nevada-Arizona-California 15 minute series topographic map produced by the United

exhibit showing the Colorado River encroaching into Section 3, but not into the subject land. Subsequent to that survey and conveyance, the river continued to move eastward until its bed covered substantially all of the subject land. (App. 10)

Prior to 1939 the active channel and bed of the river occupied the subject land. This fact is established by several exhibits which were attached to the Agreed Statement of Facts and Issues. Exhibit "H" is an aerial photo taken April 24, 1939, showing the active channel of the river passing through most of the subject land. Exhibit "I" is an aerial photo taken by the Fairchild Aerial Surveys in 1942, showing the active channel of the river occupying substantially all of the subject land. Exhibit "J" is the Davis Dam, Quadrangle-Nevada-Arizona-California 15 minute series topographic map produced by the United

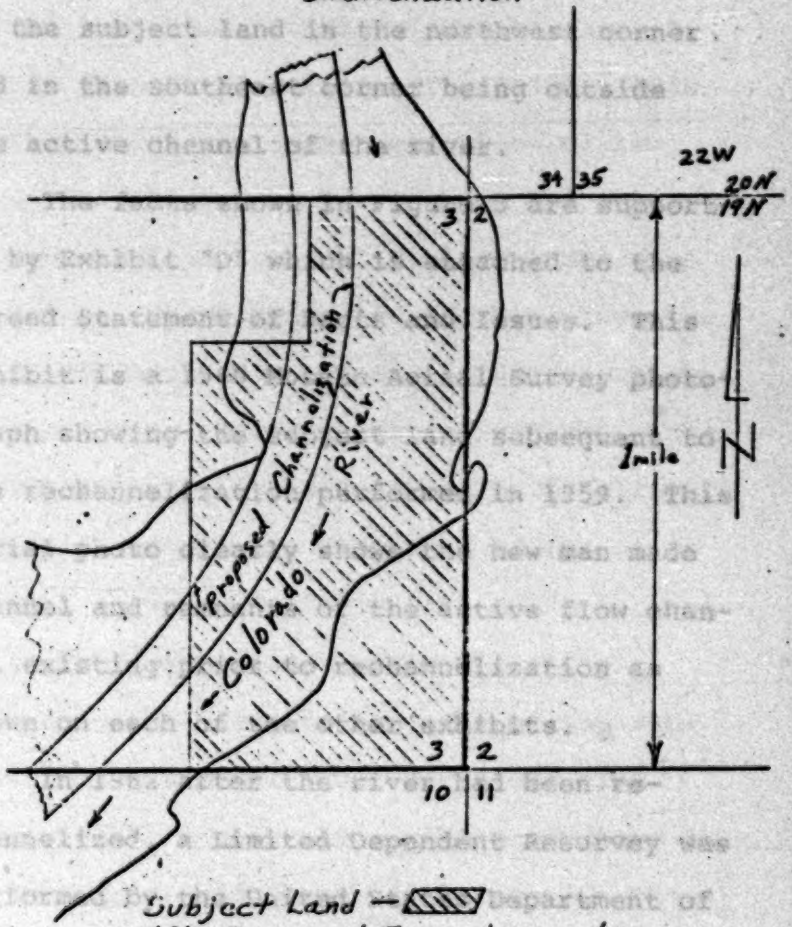
States Department of the Interior Geological Survey in 1950 showing the location of the river in the area of the subject land. Substantially all of the subject land is shown on each of these exhibits to be within the active channel of the river.

In 1959 under authority from Congress, the Bureau of Reclamation undertook to rechannel a reach of the river passing through the subject land. (App. 8) In connection with this rechannelization, a topography map identified as "Sheet No. 5, Lower Colorado River Topography" was prepared. This map was submitted with the Agreed Statement of Facts and Issues as Exhibit "E-1", and was accompanied by a letter explaining certain parts of the map. A portion of this map showing the location of the real property in relationship to the river is included herein, and is designed as Figure 3 found on page 9. It will be noted from Figure 3 that in 1959 most of

State Department of the Interior Geological Survey in 1950 showing the location of the river in the area of the subject land. Substantially all of the subject land is shown on each of these exhibits to be within the active channel of the river.

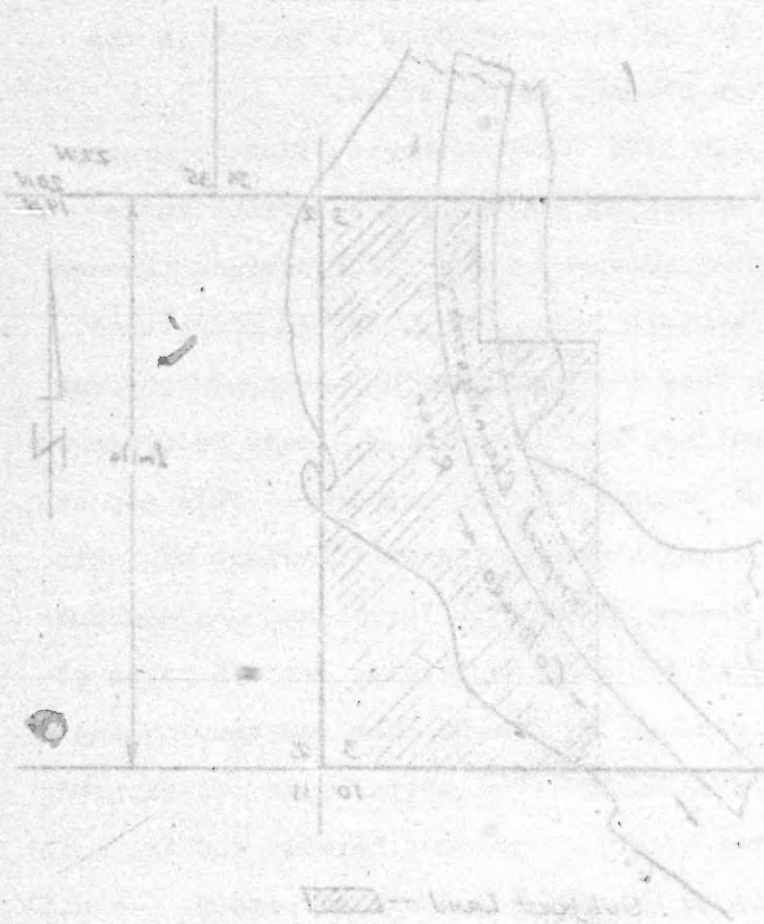
In 1939 under authority from Congress, the Bureau of Reclamation undertook to rechannel a reach of the river passing through the subject land. (Dep. 8) In connection with this rechannelization, a topography map identified as "Sheet No. 5, Lower Colorado River Topography" was prepared. This map was submitted with the Agreed Statement of Facts and Issues as Exhibit "E-1", and was accompanied by a letter explaining certain parts of the map. A portion of this map showing the location of the real property in relationship to the river is included herein, and is designated as Figure 3 found on page 9. It will be noted from Figure 3 that in 1939 most of

Sec. 3 - 19N, 22W
Subject Land in relation to 1959
River Channel before and after
Channelization



Subject Land —
1960 Revision of Topography map by
Office of River Control, Bur. of Recl.

Fig. 3. Exhibit E-1



the subject land was within the active channel of the river prior to the re-channelization, with only a small portion of the subject land in the northwest corner and in the southeast corner being outside the active channel of the river.

The facts shown in Figure 3 are supported by Exhibit "D" which is attached to the Agreed Statement of Facts and Issues. This exhibit is a 1960 Mosaic Aerial Survey photograph showing the subject land subsequent to the rechannelization performed in 1959. This aerial photo clearly shows the new man made channel and remnants of the active flow channel existing prior to rechannelization as shown on each of the other exhibits.

In 1962 after the river had been re-channelized, a Limited Dependent Resurvey was performed by the United States Department of Interior acting through the Bureau of Land Management. (App. 10) The result of this

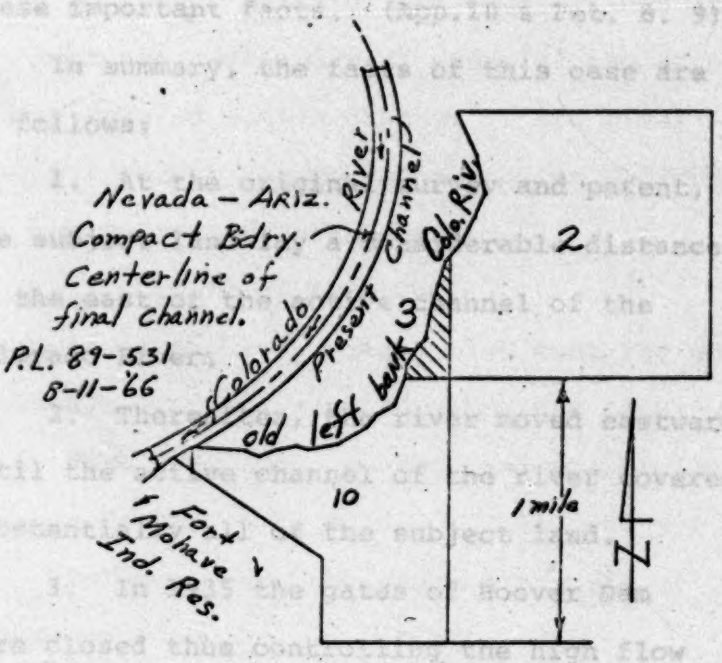
the subject land was within the active channel of the river prior to the re-channelization, with only a small portion of the subject land in the northwest corner and in the southeast corner being outside the active channel of the river.

The facts shown in Figure 3 are supported by Exhibit "B" which is attached to the Agreed Statement of Facts and Issues. This exhibit is a 1969 Mosaic Aerial Survey photograph showing the subject land subsequent to the rechannelization performed in 1959. This aerial photo clearly shows the new man made channel and remnants of the active flow channel existing prior to rechannelization as shown on each of the other exhibits.

In 1962 after the river had been rechannelized, a Limited Dependent Resurvey was performed by the United States Department of Interior acting through the Bureau of Land Management. (App. 19) The result of this

survey was submitted with the Agreed Statement of Facts and Issues as Exhibit "G", and a portion of that exhibit is included herein as Figure 4 found on page 12 and at page 55 of Petitioner's Brief. This exhibit shows the rechannelization of the river and the new boundary which had been approved by the Boundary Compact Commission of Arizona and Nevada. It further shows the "old left bank of the Colorado River" which existed prior to the rechannelization. This "old left bank of the Colorado River" line is slightly east of the left bank of the river channel shown on Exhibits "D", E-1", "I" and "J". These exhibits however all clearly show that the river in the area of the subject land has moved great distances from the original survey and since conveyances to Petitioner's predecessor in interest. The exhibits fail however to establish the manner

Sec. 3-19N, 22W
Subject Land in relation to present (Since 8-11-66) location of Colorado River.



Subject Land — ▨
1962 Resurvey by Bur. of Land Management.

Fig. 4. Exhibit G.

2
3
10
Mile
14

in which or the time at which these movements occurred. The Agreed Statement of Facts and Issues and the written and oral arguments presented to the Court on bhealf of both parties recognizes an inability to determine these important facts. (App.10 & Pet. B. 9)

In summary, the facts of this case are as follows:

1. At the original survey and patent, the subject land lay a considerable distance to the east of the active channel of the Colorado River.

2. Thereafter, the river moved eastward until the active channel of the river covered substantially all of the subject land.

3. In 1935 the gates of Hoover Dam were closed thus controlling the high flow of the river.

in which or the time at which these movements occurred. The Agreed Statement of Facts and issues and the written and oral arguments presented to the Court on behalf of both parties recognizes an inability to determine these important facts. (App.10 & Pet. B. 9)

In summary, the facts of this case are as follows:

1. At the original survey and patent, the subject land lay a considerable distance to the east of the active channel of the Colorado River.

2. Thereafter, the river moved eastward until the active channel of the river covered substantially all of the subject land.

3. In 1935 the gates of Hoover Dam were closed thus controlling the high flow of the river.

4. In 1959, the Bureau of Reclamation rechannelized the river in the area of the subject land resulting in part of said land being left dry and outside the active channel of the river.

5. Today parts of the subject land lie on both the east and west sides of the artifically created active channel of the river established by the rechannelization performed by the Bureau of Reclamation.

STATUTES INVOLVED

It is the Respondents view that the only statutes involved are the Submerged Lands Act, 43 U.S.C. 1301, et seq. and the Boulder Canyon Project Act, 43 U.S. C. 617, et seq.

Following are the pertinent parts of these statutes:

Submerged Lands Act, Section 1311 of U.S.C.

> "(a) It is determined and declared to be in the public interest that

4. In 1959, the Bureau of Reclamation rechannelized the river in the area of the subject land resulting in part of said land being left dry and outside the active channel of the river.

5. Today parts of the subject land lie on both the east and west sides of the artificially created active channel of the river established by the rechannelization performed by the Bureau of Reclamation.

STATUTES INVOLVED

It is the Respondents view that the only statutes involved are the Submerged Lands Act, 43 U.S.C. 1301, et seq. and the Boulder Canyon Project Act, 43 U.S. C. 617, et seq.

Following are the pertinent parts of these statutes:

Submerged Lands Act, Section 1311 of U.S.C.

"(a) It is determined and declared to be in the public interest that

"(1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof."

Boulder Canyon Project Act, Section 617 of 43 U.S.C.

"Colorado River Basin; protection and development; dam, reservoir, and incidental works; water, water power, and electrical energy; eminent domain.

For the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing the flow of the Colorado River, providing for storage and for delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States . . . the Secretary of the Interior . . . is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or

"(1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof."

Boulder Canyon Project Act, Section 617 of 43 U.S.C.

"Colorado River Basin; protection and development; dam, reservoir, and incidental works; water, water power, and electrical energy; eminent domain.

For the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for the flow of the Colorado River, providing for storage and for delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States . . . the Secretary of the Interior . . . is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or

"Boulder Canyon adequate to create a storage reservoir . . . and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam . . ."

QUESTIONS PRESENTED

1. Whether the ordinary high water mark and bed of a navigable river is established by and includes all of the area below the line created by the water during the usual high flow stage of the river's annual cycle.

2. Whether changes in the flow pattern of the Colorado River caused by the construction of dams and rechannelization of the stream bed by the United States, changes or alters the ordinary high water mark for purposes of changing or altering the ownership of exposed lands resulting from the construction of such works.

SUMMARY OF ARGUMENT

The brief of Petitioner suggests several issues and questions which confuse

"Boulder Canyon adequate to create a storage reservoir . . . and appurtenant structures located entirely within the United States connecting the Imperial Dam, or other suitable diversion dam . . ."

QUESTIONS PRESENTED

1. Whether the ordinary high water mark and bed of a navigable river is established by and includes all of the area below the line created by the water during the usual high flow stage of the river's annual cycle, or

2. Whether changes in the flow pattern of the Colorado River caused by the construction of dams and reclamelization of the stream bed by the United States, changes or alters the ordinary high water mark for purposes of changing or altering the ownership of exposed lands resulting from the construction of such works.

SUMMARY OF ARGUMENT

The belief of Petitioner suggests several issues and questions which confuse

An otherwise simple factual and legal situation. The Arizona Supreme Court swept aside most of these same issues when they were presented to it.

By its decisions, (State v. Bonelli, 489 P29 699 & 495 P2d 1312) the Arizona Supreme Court held:

1. At statehood, Arizona became the owner of that portion of the bed of the Colorado River lying east of the center line of the river and below the ordinary high water mark.

2. That without the presence of facts to establish the manner of improvement of a river, all changes in a bed of a navigable stream are presumed to be the result of erosion and accretion.

3. That where the bed of the river has shifted by erosion and accretion, the State continues to own the bed of the stream, even though the stream after the change covers lands which

An otherwise simple factual and legal situation. The Arizona Supreme Court swept aside most of these same issues when they were presented to it.

By its decisions, (State v. Bonelli, 489 Pts 699 & 695 P2d 1312) the Arizona Supreme Court held:

1. At statehood, Arizona became the owner of that portion of the bed of the Colorado River lying east of the center line of the river and below the ordinary high water mark.

2. That without the presence of facts to establish the manner of improvement of a river, all changes in a bed of a navigable stream are presumed to be the result of erosion and accretion.

3. That where the bed of the river has shifted by erosion and accretion, the State continues to own the bed of the stream, even though the stream after the change covers lands which

were formerly privately owned.

4. That where the bed of a navigable stream shifts by avulsive action, or is altered by man-made changes, the State continues to own the land area occupied by the bed in its last natural position.

The Arizona Supreme Court's decision is supported by the holdings in all other Courts which have considered these issues. The doctrine is sound and recognizes the "equal footing doctrine" under which Arizona became a State.

ARGUMENT

I. AT STATEHOOD, ARIZONA RECEIVED TITLE TO THE LANDS WITHIN THE BED OF THE NAVIGABLE COLORADO RIVER LYING EAST OF THE THREAD OR CENTER LINE OF THE STREAM AND BELOW THE ORDINARY HIGH WATER MARK.

The Supreme Court of the United States held in Arizona v. California, 283 U.S. 423, 75 L.ed. 1154, 51 S.Ct. 522, that the Colorado River is a navigable stream in the

were formerly privately owned.

4. That where the bed of a navigable stream shifts by avulsive action, or is altered by man-made changes, the State continues to own the land area occupied by the bed in its last natural position.

The Arizona Supreme Court's decision is supported by the holdings in all other Courts which have considered these issues. The doctrine is sound and recognizes the "equal footing doctrine" under which Arizona became a state.

ARGUMENT

I. AT STATEHOOD, ARIZONA RECEIVED TITLE TO THE LANDS WITHIN THE BED OF THE NAVIGABLE COLORADO RIVER LYING EAST OF THE THREAD OR CENTER LINE OF THE STREAM AND BELOW THE ORDINARY HIGH WATER MARK.

The Supreme Court of the United States held in Arizona v. California, 283 U.S. 423, 75 L.ed. 1154, 51 S.Ct. 522, that the Colorado River is a navigable stream in the

reach of the river involved in this action. Even though the river is not today navigable in the sense of navigation for commerce, the river still remains a navigable river. The Court, in United States v. Appalachian Electric Power Co., 311 U.S. 377, 408, 61 S. Ct. 291, reh. den., 312 U. S. 712, 61 S. Ct. 548, after citing numerous other cases, stated that once a river is found to be navigable, it remains so. In addition, it is well to note that Congress in the Boulder Canyon Project Act, 45 U.S. Stat. 1057, 43 U.S.C. Sec. 617, et seq., declares that the Colorado River in the area of the subject land is a navigable river.

It is a well established principle of law, that upon admission into the Union a State acquires title to the beds of navigable rivers between the ordinary high water marks, or where a river forms a

reach of the river involved in this action. Even though the river is not today navigable in the sense of navigation for commerce, the river still remains a navigable river. The Court, in United States v. Appalachian Electric Power Co., 311 U.S. 377, 408, 61 S. Ct. 291, reh. den., 312 U. S. 712, 61 S. Ct. 568, after citing numerous other cases, stated that once a river is found to be navigable, it remains so. In addition, it is well to note that Congress in the Boulder Canyon Project Act, 45 U.S. Stat. 1057, 43 U.S.C. Sec. 617, et seq., declared that the Colorado River in the area of the subject land is a navigable river.

It is a well established principle of law, that upon admission into the Union a State acquires title to the beds of navigable rivers between the ordinary high water marks, or where a river forms a

boundary between two states, between the ordinary high water mark on the side of the state and the center of the river. Pollard's Lessee v. Hagan, 3 How. (44 U.S.) 212, 11 L.Ed. 565; Shively v. Bowlby, 152 U.S. 1, 43, 14 S.Ct. 548; Martin, et al v. Waddell, 16 Pet. 410; Hardin v. Jordan, 140 U.S. 371; Kansas v. Colorado, 206 U.S. 46, 49; Tyson v. State of Iowa, (8th Cir., 1960) 283 F.2d 802; 56 Am Jur. Waters, Sec. 453; and 65 C.J.S. Navigable Waters, Sec. 92.

Although there have been no previous Arizona or Federal cases construing the rights of Arizona to lands underlying the navigable Colorado River, all of the United States Supreme Court cases considering other States' title to such lands within the bed of other rivers have held in favor of the States on the basis of "equal

boundary between two states, between the ordinary high water mark on the side of the state and the center of the river. Pollard's Lessee v. Hagan, 3 How. (44 U.S.) 212, 11 L.Ed. 565; Shively v. Bowlby, 152 U.S. 1, 43, 14 S.Ct. 548; Martin, et al v. Waddell, 16 Pet. 410; Martin v. Jordan, 160 U.S. 371; Kansas v. Colorado, 206 U.S. 46, 49; Tyson v. State of Iowa, (8th Cir., 1960) 283 F.2d 802; 56 Am Jur. Waters, Sec. 453; and 65 C.J.S. Navigable Waters, Sec. 92.

Although there have been no previous Arizona or federal cases construing the rights of Arizona to lands underlying the navigable Colorado River, all of the United States Supreme Court cases considering other States' title to such lands within the bed of other rivers have held in favor of the States on the basis of "equal

footing" doctrine by which the States came into the Union. 56 Am Jur.Waters, Sec. 241. The Joint Resolution of Congress admitting Arizona into the Union expressly stated that Arizona was admitted on an equal footing with other States. 37 U.S. Stat. 39. The Proclamation of President Taft creating the State of Arizona likewise made mention of this equal footing doctrine. 37 U.S. Stat. 1738. Upon her admission, Arizona at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States and could, therefore, exercise the same powers over rivers within her limits as were possessed by the original States.

Congress by the Submerged Lands Act of 1953, 67 U.S. Stat. 29, 43 U.S.C. Sec. 1301, et seq. confirmed and recognized the respective States' title to land beneath

footing" doctrine by which the States came into the Union. 56 Am Jur.Waters, Sec. 241. The Joint Resolution of Congress admitting Arizona into the Union expressly stated that Arizona was admitted on an equal footing with other States. 37 U.S. Stat. 39. The Proclamation of President Taft creating the State of Arizona likewise made mention of this equal footing doctrine. 37 U.S. Stat. 1728. Upon her admission, Arizona at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States and could, therefore, exercise the same powers over rivers within her limits as were possessed by the original States.

Congress by the Submerged Lands Act of 1953, 67 U.S. Stat. 29, 43 U.S.C. Sec. 1301, et seq. confirmed and recognized the respective States' title to land beneath

navigable waters lying within a State. Sec. 1311 of 43 U.S.C states:

> "(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof."

Although neither the Arizona or Federal Courts have construed this section of the Act, it has been construed by the Supreme Court of California. In People v. Hecker, Cal. App. 1960, 4 Cal. R. 334, the Court stated that the Submerged Lands Act was merely a declaration that title to navigable waters had already vested in the respective States

navigable waters lying within a State./Sec.

(31) of (3 U.S.C States:

"(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof."

Although neither the Arizona or Federal Courts have construed this section of the Act, it has been construed by the Supreme Court of California. In People v. Becker, Cal. App. 1960, 4 Cal. R. 334, the Court stated that the Submerged Lands Act was merely a declaration that title to navigable waters had already vested in the respective States

and by the Act such title was recognized and confirmed.

II. THE BED OF THE COLORADO RIVER IN ITS NATURAL STATE INCLUDED ALL OF THE AREA BELOW THE ORDINARY HIGH WATER MARK WHICH IS THE LINE CREATED BY THE WATER DURING THE NATURAL ANNUAL HIGH FLOW STAGE OF THE RIVER.

The central issue of this appeal involves location of the ordinary high water mark. Justice Struckmeyer, in the Arizona Supreme Court decision stated:

> "Beyond argument, title to and ownership of the lands beneath the Colorado River is in the State of Arizona from the Nevada boundary up to the ordinary high water mark in the natural channel as it existed prior to the taming of the river in 1938 (sic) by the completion of the Hoover Dam and the subsequent lowering of the channel by dredging." (State v. Bonelli Cattle Company, 495 P2d 1312, 1313.)

In conflict with this location of the ordinary high water mark, Petitioner urges that the mark is the present water line created by the re-channelization (Pet. B. p.27). In conflict with the Arizona Supreme Court and the Peti-

and by the Act such title was recognized and confirmed.

II. THE END OF THE COLORADO RIVER IN ITS NATURAL STATE INCLUDED ALL OF THE AREA BELOW THE ORDINARY HIGH WATER MARK WHICH IS THE LINE CREATED BY THE WATER DURING THE MAINTAINED ANNUAL HIGH FLOW STAGE OF THE RIVER.

The central issue of this appeal involves location of the ordinary high water mark. Justice Struckmeyer, in the Arizona Supreme Court decision stated:

> "Beyond argument, title to and ownership of the lands beneath the Colorado River is in the State of Arizona from the Nevada boundary up to the ordinary high water mark in the natural channel as it existed prior to the taming of the river in 1938 (sic) by the completion of the Hoover Dam and the subsequent lowering of the channel by dredging." (State v. Bonelli Cattle Company, 495 P2d 1112, 1313.)

In conflict with this location of the ordinary high water mark, Petitioner urges that the mark is the present water line created by the re-channelization (Pet. B. p.27). In conflict with the Arizona Supreme Court and the Peti-

tioner, is the decision of the 9th Circuit in U. S. v. Claridge, 416 F2d 933 (Cert. denied 3/2/70), 397 U.S. 961, 25 L.ed.2d 253, 90 Sup. Ct. 994, which held that the ordinary high water mark is the line of the water before rechannelization. The location of these three possible ordinary high water marks is clearly shown on the composition map at page 54 of Petitioner's Brief.

Establishment of the location of the ordinary high water mark of a navigable river and the area encompassed by the bed of that river, has been the subject of numerous cases including several cases decided by the United States Supreme Court. Howard v. Ingersol, 54 U.S. (13 How) 380; Alabama v. Georgia, 64 U.S. (23 How) 505; Oklahoma v. Texas, 260 U.S. 606. Although the language of these cases does not establish an exact rule for every fact situation, these cases

tioner, is the decision of the 9th Circuit in U. S. v. Claridge, 416 F2d 933 (Cert. denied 3/2/70); 397 U.S. 961, 25 L.ed.2d 253, 90 Sup. Ct. 994, which held that the ordinary high water mark is the line of the water before reclamation. The location of these three possible ordinary high water marks is clearly shown on the composition map at page 54 of Petitioner's Brief.

Establishment of the location of the ordinary high water mark of a navigable river and the area encompassed by the bed of that river, has been the subject of numerous cases including several cases decided by the United States Supreme Court. Howard v. Ingersoll, 54 U.S. (13 How) 380; Alabama v. Georgia, 64 U.S. (23 How) 505; Oklahoma v. Texas, 260 U.S. 606. Although the language of these cases does not establish an exact rule for every fact situation, these cases

generally hold that the ordinary high water mark of a navigable river is established at the line created by the water during the normal annual high flow stage of the river's annual cycle.

At first glance, it might appear that the location of the ordinary high water mark could best be determined by observing the facts of where the river now flows. In a normal situation, this might be so; however, in this case, we are dealing with a river which has been completely controlled since 1935 and the natural flow and marks created by the natural flow, are not today as readily observable as would be desired. However, Exhibits "H" and "I" attached to the Agreed Statement of Facts and Issues, being 1939 and 1942 aerial photographs of the subject property, give the Court an actual view of the conditions of the subject lands just a

generally hold that the ordinary high water mark of a navigable river is established at the line created by the water during the normal annual high flow stage of the river's annual cycle.

At first glance, it might appear that the location of the ordinary high water mark could best be determined by observing the facts of where the river now flows. In a normal situation, this might be so; however, in this case, we are dealing with a river which has been completely controlled since 1935 and the natural flow and marks created by the natural flow, are not today as readily observable as would be desired. However, Exhibits "H" and "I" attached to the Agreed Statement of Facts and Issues, being 1939 and 1941 aerial photographs of the subject property, give the Court an actual view of the conditions of the subject lands just a

few years after complete control of the river. We submit that the natural flow of the river established the ordinary high water mark and subsequent man-made changes in the flow of the river brought about by Hoover Dam and the rechannelization had no effect upon that ordinary high water mark.

In Howard v. Ingersol, supra, the United States Supreme Court faced with a problem of defining the bed of the Chattahoochee River for purposes of establishing the boundary line between the State of Georgia and Federal Territory, established a definition of the bed of the river. This definition has since been followed in substantially all cases which have attempted to define the ordinary high water mark and the bed of a navigable river. The Court stated:

> ". . . when banks of rivers were spoken of, those boundaries were meant to contain their waters at the highest flow, and in that

few years after complete control of the river. We submit that the natural flow of the river established the ordinary high water mark and subsequent man-made changes in the flow of the river brought about by Hoover Dam and the reclamation had no effect upon that ordinary high water mark.

In Howard v. Ingersol, supra, the United States Supreme Court faced with a problem of defining the bed of the Chattahoochee River for purposes of establishing the boundary line between the State of Georgia and Federal Territory; established a definition of the bed of the river. This definition has since been followed in substantially all cases which have attempted to define the ordinary high water mark and the bed of a navigable river. The Court stated:

> ". . . when banks of rivers were spoken of, those boundaries were meant to contain their waters at the highest flow, and in that

> "condition they make what is called 'the bed of the river' . . ."(54 U.S. (13 How.) 380, 415)

And,

> ". . . the call is for the banks, the fast land which confines the water of the river in its channel or bed in its whole width . . . the bank or slope from the bluff or perpendicular of the bank may not be reached by the water for 2/3 of the year, still the water line impressed on the slope is the line required by the Commissioner, and the shore of the river though left dry for any time, and but occasionally covered by water in any stage of it to the bank, was retained by Georgia as the river up to that line . . . both bank and bed to be ascertained by inspection and the line is where the action of the water has permanently marked itself upon the soil. (54 U.S. (13 How.) 380, 417)

A few years after the decision in Howard, a similar question came before the Supreme Court. In Alabama v. Georgia, supra, the Court reiterated the basic concept as to the location of the bed of a river and stated:

> ". . .(T)he bed of the river is that portion of soil which is alternately covered and left bare, as there may be an increase or diminution in the supply

"condition they make what is called
the bed of the river' . . ."(54 U.S.
(13 How.) 380, 415)

and,

". . . the call is for the banks, the
last land which confines the water of
the river in its channel or bed in its
whole width . . . the bank or slope from
the limit or perpendicular of the bank
may not be reached by the water for
1/3 of the year, still the water was
impressed on the slope is the line re-
quired by the Commissioner, and the
shore of the river through left dry for
any time, and but occasionally covered
by water in any stage of it to the
bank, was retained by Georgia as the
river up to that line . . . both bank
and bed to be segregated by inspection
and the line is where the action of the
water has permanently marked itself
upon the soil. (54 U.S. (13 How.) 380,
415)

A few years after the decision in Howard,
a similar question came before the Supreme Court
in Alabama v. Georgia, supra, the Court reiter-
ated the basic concept as to the location of the
bed of a river and stated:

". . . (T)he bed of the river is that
portion of soil which is alternately
covered and left bare, as there may be
an increase or diminution in the supply

> "of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extra ordinary freshets of winter or spring, or the extreme drought of the summer or autumn. . . ." (64 U.S.(23 How.) 505,515

The difficulty in determining the exact location of the ordinary high water mark where substantial changes have been made which have controlled the flows of the river was recognized by the Arizona Supreme Court. In its supplemental decision, in State v. Bonelli Cattle Company, 495 P2d 1312, the Court stated:

> "Congress, of course, could not constitutionally diminish the property rights of the states to the beds of navigable rivers as settled by over 100 years of decisions of the Supreme Court of the United States commencing with Pollard v. Hagan, 44 U.S. (3 How) 212, 11 L.ed 565, in 1845. Most certainly, the United States government could not claim additional rights in the bed of a navigable river by the construction of dams and artificial channels. Nor do we find such an intent." (p. 1313)

And,

> ". . . The subsequent artificial control of the river could not deprive Arizona of

"of water, and which is adequate to
contain it at its average and mean
stage during the entire year, without
reference to the extra ordinary freak-
ets of winter or spring, or the
extreme drought of the summer or
autumn. . . " (64 U.S.(23 How.) 505,515

The difficulty in determining the exact location of the ordinary high water mark where substantial changes have been made which have controlled the flows of the river was recognized by the Arizona Supreme Court. In its supple-mental decision, in State v. Bonelli Cattle Company, 405 P2d 1312, the Court stated:

"Congress, of course, could not con-
stitutionally diminish the property rights
of the states to the beds of navigable
rivers as settled by over 100 years of
decisions of the Supreme Court of the
United States commencing with Pollard v.
Hagan, 44 U.S. (3 How) 212, 11 L.ed 565,
in 1845. Most certainly, the United
States government could not claim addi-
tional rights in the bed of a navigable
river by the construction of dams and
artificial channels. Nor do we find
such an intent." (p. 1313)

And,

". . . The subsequent artificial control
of the river could not deprive Arizona of

> "property rights in the bed which were constitutionally vested prior to the completion of Hoover Dam in 1938 (sic) and the later rechannelizing by dredging. The condition of the Colorado River at or immediately prior to its control by artifical works is the appropriate time for determining the rights of the parties, although, of course, evidence of the river's condition thereafter may be illuminating." (p. 1314)

The Arizona Supreme Court then cited the rule laid down in Howard v. Ingersoll, supra, and the rule of the Supreme Court of Iowa in State v. Sorenson, 222 Iowa 1248, 271 N.W. 234, which stated:

> "An accepted definition of 'high-water mark' is set out in the case of City of Cedar Rapids v. Marshall, 199 Iowa 1262, loc. cit. 1264, 203 N.W. 932, 933, where this court said: 'The term 'ordinary high-water mark' has been frequently defined by this and many other courts. It is not the line reached by unusual floods, but it is the line to which high water ordinarily reaches. [Citing case]' 'High water mark' means what its language imports -- a water mark. It is coordinate with the limit of the bed of the water; and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes. [Citing cases]'
>
> The high-water mark, therefore, may be

"property rights in the bed which were
constitutionally vested prior to the con-
struction of Hoover Dam in 1938 (sic) and
the later reclamation by dredging. The
condition of the Colorado River at or
immediately prior to its control by
artificial works is the appropriate time
for determining the rights of the parties,
although, of course, evidence of the
river's condition thereafter may be illum-
inating." (p. 1314)

The Arizona Supreme Court then cited the rule
laid down in Howard v. Ingersoll, supra, and
the rule of the Supreme Court of Iowa in State
v. Sorenson, 222 Iowa 1228, 271 N.W. 234,
which stated:

"An accepted definition of 'high-water
mark' is set out in the case of City of
Cedar Rapids v. Merchall, 195 Iowa 1222,
192 N.W. 1024, 1026. [Citing cases]
This court said: 'The term "ordinary high-
water mark" has been frequently defined
by this and many other courts. It is not
the line reached by unusual floods, but
it is the line to which high water
ordinarily reaches. [Citing cases]'
'High water mark' means what its language
imports -- a water mark. It is coordinate
with the limit of the bed of the water;
and that only is to be considered the bed
which the water occupies sufficiently long
and continuously to wrest it from vegeta-
tion, and destroy its value for agricul-
tural purposes. [Citing cases]'
The high-water mark, therefore, may be

> "defined as to the line to which high water ordinarily reaches, and is not the line reached by the water in unusual floods. It is that line below which the soil is unfit for vegetation or agricultural purposes." (495 P2d 1312, 1314)

The bed of the Colorado River to which the State of Arizona took title, was established by the ordinary high water mark as it existed in its natural state prior to closing of the gates of Hoover Dam in 1935. That ordinary high water mark is the eastern most line shown on the composite map at page 54 of Petitioner's Brief. In the alternateive, if the Court agrees with the 9th Circuit decision in U.S. v. Claridage, supra, the ordinary high water mark must be established as the mark shown on Figure 3 at page 9 and the center line shown on the composite map at page 54 of Petitioner's Brief.

We find no cases which hold that rechannelization alters the ordinary high water mark and is sufficient to deprive a State of its title to the natural bed

of a river as it existed prior to that rechannelization.

III. THE STATE OF ARIZONA CONTINUES TO OWN THE NEW BED OF THE COLORADO RIVER WHERE IT IS ALTERED BY NATURAL ACCRETIVE MOVEMENTS OF THE RIVER.

Figures 1 through 4 included in this brief, clearly illustrate that the active flow channel of the Colorado River in the area of the subject land moved eastward a considerable distance between statehood and the date of rechannelization by the United States. The Petitioner suggests that Federal law controls the ownership of land gained or lost by accretion. Whether Federal or State law controls the present case is immaterial because State and Federal law are the same.

A. WHERE MOVEMENTS OF A NAVIGABLE STREAM ARE FOUND TO BE ACCRETIVE, OR RELICTIVE AS DIFFERENTIATED FROM AVULSIVE, THE STATE CONTINUES TO OWN THE NEW BED OF THE RIVER ESTABLISHED BY ACCRETION OR RELICTION.

A great body of law has been established involving movements of navigable rivers and

of a river as it existed prior to that

reclamelization.

III. THE STATE OF ARIZONA CONTINUES TO OWN THE NEW BED OF THE COLORADO RIVER WHERE IT IS ALTERED BY NATURAL ACCRETIVE MOVEMENTS OF THE RIVER.

Figures 1 through 4 included in this brief clearly illustrate that the active flow channel of the Colorado River in the area of the subject land moved eastward a considerable distance between statehood and the date of reclamelization by the United States. The Petitioner suggests that Federal law controls the ownership of land gained or lost by accretion, Whether Federal or State law controls the present case is immaterial because State and Federal law are the same.

A. WHERE MOVEMENTS OF A NAVIGABLE STREAM ARE FOUND TO BE ACCRETIVE, OR RELICTIVE AS DIFFERENTIATED FROM AVULSIVE, THE STATE CONTINUES TO OWN THE NEW BED OF THE RIVER ESTABLISHED BY ACCRETION OR RELICTION.

A great body of law has been established involving movements of navigable rivers and

the resulting effect on title to land within the bed of the stream and abutting the banks of the stream. Movements occur through three basic methods -- avulsion, accretion and reliction. These terms are defined as follows:

> "Accretion is the increase of riparian land by the gradual deposit, by water, of solid material, whether mud, sand, or sediment, so as to cause that to become dry land which was before covered by water. The term 'alluvion' is applied to the deposit itself, while accretion denotes the act. However, the terms are frequently used synonymously.
>
> 'Reliction' or 'dereliction' differs from 'alluvion' in this, that the term is applied to land made by the withdrawal of the waters by which it was previously covered instead of the building up of the bottom by deposits displacing the waters. It is to be noted, however, that the temporary subsidence of waters occasioned by the seasons, coming in winter, staying through spring, going in summer, and gone through the autumn does not constitute dereliction in the sense of an addition to the contiguous lands, susceptible of private ownership as riparian rights. Where water periodically rises over land and then recedes, there is no relicion.

the resulting effect on title to land within the bed of the stream and abutting the banks of the stream. Movements occur through three basic methods -- avulsion, accretion and reliction. These terms are defined as follows:

> "Accretion is the increase of riparian land by the gradual deposit, by water, of solid material, whether mud, sand, or sediment, so as to cause that to become dry land which was before covered by water. The term 'alluvion' is applied to the deposit itself, while accretion denotes the act. However, the terms are frequently used synonymously.
>
> 'Reliction' or 'dereliction' differs from 'alluvion' in this, that the term is applied to land made by the withdrawal of the waters by which it was previously covered instead of the building up of the bottom by deposits displacing the waters. It is to be noted, however, that the temporary subsidence of waters occasioned by the seasons; coming in winter, staying through spring, going in summer, and gone through the autumn does not constitute dereliction in the sense of an addition to the contiguous lands, susceptible of private ownership as riparian rights. Where water periodically rises over land and then recedes, there is no reliction.

> 'Avulsion' is a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream . . . "
> 56 Am. Jur. Waters, 476, p. 891.

These doctrines are a part of the doctrine of riprarian rights existing in connection with title to land abutting a navigable stream. They are based upon the principle that an owner of land abutting a stream risks losing his land by erosive action of the water and should therefore benefit in cases where lands are created abutting his property. County of St. Clair v. Lovingston, 90 U.S. 46. English law established the rule that if a change occurred in the lands abutting the navigable river, resulting in the uncovering of land, this should not belong to the abutting owner, but rather to the King. Blackstone, 2 Commentaries, 262. The English rule, giving title to accretion to the sovereign, however, has not prevailed in the United States.

Until the instant case, the Arizona Supreme Court had never considered directly the effect of accretion on the boundary between the river bed and the upland. The Arizona Court had, however, considered the rights to accretion land and adopted the doctrine of accretion, including its effect on the bed of the river. State v. Jacobs, 93 Ariz. 336, 380 P2d 98 and State v. Gunther & Shirley Co., 5 Ariz. App. 77, 423 P2d 352. The Arizona Court followed the Federal law regarding this subject. Arkansas v. Tennessee, 246 U.S. 158, 173.

B. WHERE FACTS ARE INSUFFICIENT TO ESTABLISH THE MANNER OF MOVEMENT OF A NAVIGABLE STREAM, THERE IS A PRESUMPTION THAT MOVEMENTS WERE ACCRETIVE AND NOT AVULSIVE.

We have heretofore indicated that no facts were produced in the Court below to establish that eastward movements of the Colorado River between 1903 and 1935 were by avulsion or

Until the instant case, the Arizona Supreme Court had never considered directly the effect of accretion on the boundary between the river bed and the upland. The Arizona Court had, however, considered the rights to accretion land and adopted the doctrine of accretion, including its effect on the bed of the river. State v. Jacobs, 93 Ariz. 356, 380 P2d 96 and State v. Gunther & Shirley Co., 5 Ariz. App. 77, 423 P2d 383. The Arizona Court followed the federal law regarding this subject. Arkansas v. Tennessee, 246 U.S. 158, 173.

3. WHERE FACTS ARE INSUFFICIENT TO ESTABLISH THE MANNER OF MOVEMENT OF A NAVIGABLE STREAM, THERE IS A PRESENTATION THAT MOVEMENTS WERE ACCRETIVE AND NOT AVULSIVE.

We have heretofore indicated that no facts were produced in the Court below to establish that disputed movements of the Colorado River between 1935 and 1955 were by avulsion or

accretion. The Arizona Supreme Court in the first Bonelli decision (489 P2d 699, 702), recognized the rule of law that in the absence of clear evidence to the contrary, the movement of a river will be presumed to be by erosion and accretion. See also, Nebraska v. Iowa, 143 U.S. 359, 369-370 (1892), County of St. Clair v. Lovingston, 90 U. S. 46, 68-69 (1874).

C. WHERE THE BED OF A NAVIGABLE RIVER IS ALTERED BY ARTIFICIAL CHANGES, THE STATE CONTINUES TO OWN THAT PORTION OF THE BED WHICH IT OWNED PRIOR TO THE ALTERATION.

The facts establish that subsequent to 1935, when the gates of Hoover Dam were closed, and again subsequent to 1959, the bed of the Colorado River in the area of the subject land was altered by man-made action. The first alteration, at the time the gates of Hoover Dam were closed, resulted in controlled flows of the Colorado River, thus reducing the high flows and preventing inundation of part of the

accretion. The Arizona Supreme Court in the first Bonnell decision (485 P2d 699, 702), recognized the rule of law that in the absence of clear evidence to the contrary, the movement of a river will be presumed to be by erosion and accretion. See also, Nebraska v. Iowa, 143 U.S. 359, 369-370 (1892), County of St. Clair v. Lovingston, 90 U. S. 46, 68-69 (1874).

C. WHERE THE BED OF A NAVIGABLE RIVER IS ALTERED BY ARTIFICIAL CHANGES, THE STATE CONTINUES TO OWN THAT PORTION OF THE BED WHICH IT OWNED PRIOR TO THE ALTERATION.

The facts establish that subsequent to 1935, when the gates of Hoover Dam were closed, and again subsequent to 1859, the bed of the Colorado River in the area of the subject land was altered by man-made action. The first alteration, at the time the gates of Hoover Dam were closed, resulted in controlled flows of the Colorado River, thus reducing the high flows and preventing inundation of part of the

bed of the river to the east of the center line of the Colorado River. The second alteration in 1959 resulted in a part of the river bed being removed from the active channel of the river.

We submit that the man-made changes had no effect upon the location or extent of the bed of the river, and the land shown on Figure 1 lying between the 500 foot contour and the 1959 center line, shown on Figure 3, remains a part of the river bed and is owned by the State of Arizona. In the alternative, if the Court rejects Respondents' theory of the pre-Hoover Dam ordinary high water mark, then, we submit, that the second alteration, being the rechannelization, had no effect upon the location or extent of the river bed and that the land shown on Figures 3 and 4 lying between the "old left bank" to the east and the centerline of the artificial channel

bed of the river to the east of the center line of the Colorado River. The second alteration in 1959 resulted in a part of the river bed being removed from the active channel of the river.

We submit that the man-made changes had no effect upon the location or extent of the bed of the river, and the land shown on Figure 1 lying between the 500 foot contour and the 1959 center line, shown on Figure 3, remains a part of the river bed and is owned by the State of Arizona. In the alternative, if the Court rejects Respondents' theory of the pre-Hoover Dam ordinary high water mark, then, we submit, that the second alteration, being the rechannelization, had no effect upon the location or extent of the river bed and that the land shown on Figures 3 and 4 lying between the "old left bank" to the east and the centerline of the artificial channel

to the west remains a part of the river bed and is owned by the State of Arizona.

The law is clear that a sudden and perceptible change in the bed of a river works no change upon title to the lands underlying that river. Arkansas v. Tennessee, 246 U.S. 158, 173; People v. Shasta Pipe and Supply Co., 70 Cal. Rptr. 618; Padgett v. Central and Southern Florida Flood Control District (Fla.), 178 So.2d 900; State v. Aucoin, 206 La. 786, 20 So.2d 136; Ray v. State (Tex), 153 S.W.2d 660; Wilemon v. City and County of Dallas Levee Imp. Dist., (Tex), 264 S.W.2d 543 (cert. den. 348 U.S. 829.

The Petitioner recognizes the suddeness of change in the bed of the river brought about by the rechannelization (Pet. B. 28) and argues that the rechannelization brought about a re-emergence of previously submerged land. The "submergence and reappearance" argument was made to the Arizona Supreme Court.

to the west remains a part of the river bed and is owned by the State of Arizona.

The law is clear that a sudden and perceptible change in the bed of a river works no change upon title to the lands underlying that river, Arkansas v. Tennessee, 246 U.S. 158, 173; People v. Shasta Pipe and Supply Co., 76 Cal. Rptr. 619; Padgett v. Central and Southern Florida Flood Control District (Fla.) 176 So.2d 920; State v. Ancoin, 406 La. 786, 76 So.2d 136; Ray v. State (Tex), 153 S.W.2d 440; Wilemon v. City and County of Dallas Levee Imp. Dist., (Tex), 264 S.W.2d 543 (ref. Cer. 348 U.S. 873).

The Petitioner recognizes the suddenness of change in the bed of the river brought about by the reclamalization (Pet. p. 28) and argues that the reclamalization brought about a re-emergence of previously submerged land. The "submergence and reappearance" argument was made to the Arizona Supreme Court,

Simply stated, this doctrine means this: When a river moves across land by accretion, completely eroding away the intervening land but by subsequent action of the river the land previously eroded away is restored or reappears by accretion or reliction, title to the former owner reattaches to the land thus reappearing. Towl, et al, v. Kelly and Blankenship, 54 I.D. 455 (1934); Herron v. Choctaw and Chickasaw Nations, (10th Cir 1956) 228 F2d 830; Elliot v. Atlantic City, (CC, D.N.J., 1907), 149 F. 849, 853; Stockley v. Cissna, (6th Cir. 1902), 119 F. 812, 831; and Widdecombe v. Rosemiller, 118 F. 295, 299-300). The facts presented in this case simply do not indicate that this doctrine is applicable. The Arizona Supreme Court

simply stated, this doctrine means that when a river moves across land by accretion, completely eroding away the intervening land but by subsequent action of the river the land previously eroded away is restored or reappears by accretion or relliction, title to the former owner reattaches to the land thus reappearing.

Yuma, et al. v. Kelly and Blackenship, 54 S.D. 465 (1934); Nelson v. Chocteau and Delorme Ranches, (10th Cir. 1955) 229 Fed 810; Elliot v. Atlantic City, (DC, D.N.J., 1901), 109 F. 849, 853; Rockaway v. Cleaves, (6th Cir. 1902), 119 F. 812, 811; and Waddecombe v. Rockefeller, 119 F. 293, 309-310).

The cases presented in this case simply do not indicate that this doctrine is applicable. The Arizona Supreme Court

recognizing the lack of the necessary facts to justify application of this doctrine, stated:

> "We believe, however, that the dredging of the river is an engineering relocation of the waters of the river by artificial means and is not a true case of withdrawal or retrogression." (489 P2d 702)

IV. PETITIONER'S OTHER CONTENTIONS ARE WITHOUT MERIT.

A. WHETHER A DECISION OF THE ARIZONA SUPREME COURT AFFECTS TITLE TO FEDERAL LAND AND INDIAN LAND AS WELL AS PRIVATE LAND BORDERING THE COLORADO RIVER.

Petitioner and amicus curiae before the Arizona Supreme Court, sought to broaden the issues to include questions regarding title to Federal and Indian lands and title to vast acreage of private lands in other areas along the Colorado River. These title questions are outside the scope of this appeal and even if the other parties were properly before this Court, the law controlling accretion and

the bed of the river as heretofore discussed, would remain the same.

B. THE EFFECT OF THE SUBMERGED LANDS ACT.

As heretofore discussed, Congress by the Submerged Lands Act of 1953, 67 U.S. Stat. 29, 43 U.S.C. Sec. 1301, et seq., confirmed and recognized the respective states title to land beneath navigable waters lying within a state. As stated in People v. Hecker, supra, the Submerged Lands Act was merely a declaration that title to the navigable waters had already vested in the respective states and by the Act such title was recognized and confirmed.

C. THE DECISIONS OF THE ARIZONA SUPREME COURT DO NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT COMPENSATION.

The Petitioner argues that the State of Arizona has, by decision of the Arizona Supreme Court, taken property without compensation. This argument seems to be economic rather than

legal and, therefore, not controlling. In any event, if a taking of property occurred, it was a taking resulting from the legal doctrine of accretion and occurred slowly and imperceptibly as the Colorado River moved eastward across land which had been patented to Petitioner's predecessor in interest by the United States.

The Petitioner argues that the doctrine of equitable estoppel should be applied to prohibit the State of Arizona from asserting its title to the bed of the Colorado River. The elements of equitable estoppel are set forth at 3 Pomeroy's Equity Jurisprudence, Sec. 805 at p.191. These elements include, (1) conduct or silence amounting to a representation or a concealment of material facts, (2) the facts must be known to the party estopped, (3) the truth concerning the facts must be unknown to the party claiming the

benefit of the estoppel, (4) the conduct must be done with the intention or at least with the expectation that it will be enacted upon by the party, (5) the conduct must be relied upon by the other party, and (6) the party claiming the estoppel must in fact act in such a manner as to change his position for the worse.

When the facts of the instant case are applied to these elements, it is clear that equitable estoppel does not lie. Because of the meanderings of the Colorado River, it has always been difficult for Arizona to assert ownership to any particular lands because the State's ownership is "at the mercy of the river". In no way has there been any false representation or concealment of any material facts by the State of Arizona.

No authority exists that says the State must legislate or make an executive decree concerning land title, as is suggested in Petitioner's

Brief. The State has no legal duty to speak, therefore, Bonelli has no right to rely on the State's executive and legislative silence. The Petitioner took title to the land in question by Warranty Deed, dated the 12th of August, 1955 (App. 14). On that date, as is shown on Exhibit E-1, a copy of which is attached to the Agreed Statement of Facts and Issues and is included herein as Figure 3, the bed of the Colorado River occupied substantially all of the land described in the Warranty Deed. Therefore, it seems impossible that the Petitioner can now claim he acted in reliance on the action or inaction of the State of Arizona. Whether Petitioner was ignorant of the facts is of no moment since he had the opportunity to inspect the property and to determine if it was within the bed of the Colorado River.

Any taking of Petitioner's land which

has occurred is a taking resulting from the movement of the Colorado River.

CONCLUSION

In 1955, the Petitioner received a Warranty Deed to the subject land. This land was originally patented to Petitioner's predecessors in interest shortly after Arizona statehood. The land was a considerable distance from the surveyed bed of the Colorado River but within an area which had been inundated by the river's high flows in previous years. Construction of Hoover Dam reduced the flow of the Colorado River in 1935 and the usual high flows no longer inundated the subject lands. The active channel of the river moved eastward until in 1955 the majority of the subject land was covered by the flow of the river. In 1959, the river was rechannelized by the United States through the subject land, constricting the

river to a small area and leaving exposed from the prior flow of the Colorado River, a large portion of the subject land.

The State of Arizona is the owner of the bed of the navigable Colorado River. That bed changed slowly and imperceptibly as the river moved eastward and Arizona retained title to the bed when it was abandoned by reduction of water when the gates of Hoover Dam were closed in 1935 and when the rechannelization occurred in 1959.

The decision of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

GARY K. NELSON
THE ATTORNEY GENERAL
OF ARIZONA

By: Dale R. Shumway
Special Assistant
64 E. Broadway
Tempe, Arizona 85282

PROOF OF SERVICE

I, JOHN M. McGOWAN, Special Assistant Attorney General, one of the attorneys for the above-named respondents herein, and a member of the Bar of the Supreme Court of the United States, certify that on the 15 day of June, 1973, I served copies of the foregoing Brief of Respondents on the Petitioners by mailing copies in duly addressed envelopes with first class postage prepaid to their attorneys of record as follows:

ELMER C. COKER
132 South Central Avenue
Phoenix, Arizona 85004

THE HONORABLE LEONARD C. LANGFORD
Mohave County Attorney
Courthouse
Kingman, Arizona 86401

Attorneys for Petitioners

GARY K. NELSON
The Attorney General

By John M. McGowan
JOHN M. McGOWAN

SUBSCRIBED AND SWORN to before me this 15 day of June, 1973.

E. Louise Lang
Notary Public

My commission expires: 10-24-73